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No. 07-360

IN THE

Supreme Court of the United States

MARY LOU SMITH,

Petitioner,

v.

HONORABLE ANDREW N. FRYE, JR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF

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REPLY BRIEF FOR THE PETITIONER

Judge Frye does not dispute the importance of the First Amendment issue presented in Mary Lou Smith's Petition but, instead, argues that the decision does not sanction political firings or otherwise limit the *Elrod-Branti* line of cases. He is wrong. The Fourth Circuit's language, holding and analysis restrict the scope of *Elrod v. Burns*, 427 U.S. 347 (1976), and invite district courts in the Fourth Circuit to uphold political firings during electoral campaigns where public employees are fired by someone other than the candidate. Judge Frye is not entitled to qualified immunity upon the facts of this case but, even if he were, the importance of the Fourth Circuit's decision in sanctioning certain politically-motivated firings justifies granting certiorari. Allowing this decision to stand will enable public officials across the country to rely on this case to argue that the law in this area is not clearly established.

Judge Frye also asserts that Ms. Smith fails to allege adequately the basis for her First Amendment claim. However, the Complaint clearly and unequivocally alleges a substantial **factual basis** for her First Amendment claim. App. D, Complaint, 47a-54a. Instead of accepting Ms. Smith's factual pleadings as true, the Fourth Circuit engaged in unwarranted speculation as to constitutionally permissible reasons Judge Frye may have had for firing her even though Judge Frye did not personally offer those reasons when asked to do so at Ms. Smith's administrative hearing.

1. The decision narrows the scope of *Elrod-Branti* as those cases have previously been interpreted

Respondent is plainly wrong when he contends that "the Fourth Circuit's decision in no way narrows the scope of *Elrod-Branti*, and other applicable precedent regarding the First Amendment associational rights of public employees." Response, 1. To the contrary, the decision authorizes a public

official to fire any public employee who supports a candidate other than those candidates favored by the official. The decision does so because it limits the applicability of *Elrod-Branti* to two narrow categories of political firings:

> We are disinclined to disturb that balance on these facts. Judge Frye dismissed Ms. Smith from her at-will employment as magistrate court clerk, a position to which it is unclear *Elrod*'s protections apply, *neither in the heat of his own campaign nor during a victory housecleaning*. We do not find that Ms. Smith alleges a constitutional violation here, and therefore affirm the district court's dismissal of her claims.

App. A, Fourth Circuit decision, 14a-15a, emphasis added. The inclusion of the words "on these facts" may suggest that some other facts might lead to a different result, but given the strength of the facts establishing that Ms. Smith's termination was political in nature it appears unlikely that such a case will arise.

Elrod-Branti and its progeny have long established the principle that public employees are protected from political firings unless the employee is a policymaker or a confidential employee.[1] Ms. Smith is unaware of any decision, prior to the present case, that even implied that political firings are permissible if they are done by a colleague of the candidate, rather than by the candidate himself. Nor has Judge Frye identified any such decisions in his Response. To the contrary, as this Court stated in *Branti*,

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[1] *See* Petition 11 n.12, 23-24 (discussing Judge Frye's failure to raise the confidential/policymaker exception as a defense below and the lack of evidence in the record to suggest that Ms. Smith's position as a magistrate court clerk falls into the *Elrod* exception).

> If the First Amendment protects a public employee from discharge based on what he has said, it must also protect him from discharge based on what he believes. Under this line of analysis, unless the government can demonstrate an overriding interest of vital importance requiring that a person's private beliefs conform to those of the hiring authority, his beliefs cannot be the sole basis for depriving him of continued public employment.

Branti v. Finkel, 445 U.S. 507, 515-516 (1980) (internal citations to *Elrod* omitted).[2] Nothing in the language of *Branti* or its progeny suggests that *Branti* really meant that a public employee's "beliefs" **can** "be the sole basis for depriving him of continued public employment" so long as the person doing the firing is not himself a candidate. Thus, contrary to Judge Frye's contention, the Fourth Circuit's decision creates a significant exception to the well-understood First Amendment prohibition on retaliatory political firings.

In an effort to minimize the significance of the Fourth Circuit's decision, Judge Frye contends that the Fourth Circuit never intended to suggest that its two "archetypes" of *Elrod-Branti* cases were exhaustive. Response, 10. However, the Fourth Circuit's rejection of Ms. Smith's claim rests on its conclusion that her claim falls outside the two categories of *Elrod-Branti* cases: those where the public employee supports a candidate who is running against his employer and those where the employee's employer loses an election and the

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[2]As *Branti* makes clear, the First Amendment also protects Ms. Smith from being fired for her "private beliefs." Thus, Ms. Smith's failure to speak out in support of her son's candidacy prior to her termination is not determinative where she was fired because Judge Frye "believed that Ms. Smith supported her son, not the incumbent circuit clerk." App. D, Complaint, 49a ¶ 18.

victorious candidate fires him as part of a victory housecleaning. App. A, Fourth Circuit decision, 14a-15a (concluding that Ms. Smith was dismissed neither in the heat of Judge Frye's own campaign nor during a victory housecleaning.). *See also, id.* at 10a n.4 (noting that "the lines between the two types of *Elrod* cases are not always bright and distinct," thereby suggesting that there are only two types of *Elrod* cases, *i.e.*, the two archetypes identified by the majority panel); *id.* at 11a (stating that "[a]n assessment of decisions of our sister circuits interpreting *Elrod* reveals the same fact patterns described above").

By focusing on the factual scenarios in which *Elrod-Branti* cases historically arise, the Fourth Circuit created categories based on who did the firing and when the firing occurred instead of focusing on whether the employer acted with the prohibited political animus. App. A, Fourth Circuit decision, 13a (distinguishing Judge Frye from the public official in *Knight v. Vernon*, 214 F.3d 544 (4th Cir. 2000) because "Judge Frye was not himself seeking office and terminating those who did not support his candidacy" when, in fact, Judge Frye and the public official in *Knight* both had the motive and intent to fire an employee because of her support for a particular candidate).[3] As a result, the Fourth Circuit failed to realize that Ms. Smith's case strikes at the very core of the First Amendment: she was fired precisely because a powerful local public official, the Chief Judge, believed that she supported her son's candidacy against the incumbent circuit clerk in the upcoming primary election. As this Court explained in *Elrod*, "political belief and association constitute

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[3]Even a more generous reading of the Fourth Circuit's opinion is seriously wrong because the two archetypes it discusses do not define the core of the right. The litigated cases often tend to be those at the periphery of the right where there may be reasonable arguments that the Constitution has not been violated.

the core of those activities protected by the First Amendment" and "if there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, ..." 427 U.S. at 356 (internal citations omitted). The Fourth Circuit's decision, if allowed to stand, undermines the electoral process by allowing public officials to be the arbiters of what shall be orthodox in electoral politics.

The decision not only gives non-candidate public employers the right to fire employees who are believed to support a disfavored candidate or faction, but it also greatly extends the cloak of qualified immunity for politically-motivated firings. The impact of the decision is not restricted to the Fourth Circuit but will extend across the United States as public employers can now rely on it to argue that they are entitled to qualified immunity because the law protecting public employees in Ms. Smith's position is no longer "clearly established." *Harlow v. Fitzgerald*, 457 U.S. 800, 818-819 (1982) (explaining that "[i]f the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful").

Finally, Judge Frye is not entitled to qualified immunity where, by his own admission, "[i]t is certainly reasonable to assume that a governmental official should know that at-will employees cannot be dismissed solely because of their political beliefs." Response, 14. As Judge Frye surely knows, firing a public employee because she supports the wrong candidate or fails to support the right candidate is as much a violation of the First Amendment as firing her because of her particular political beliefs. *See generally*, Petition, 14-17 (collecting cases recognizing that the First Amendment protects the rights of public employees to support particular candidates or political factions within the same party). Thus, Ms. Smith was not required to identify either her political beliefs or those of Judge

Frye to overcome Judge Frye's defense of qualified immunity as she clearly alleged that Judge Frye retaliated against her because of her son's political candidacy.

2. Petitioner has clearly alleged sufficient facts to survive a Rule 12(b)(6) motion to dismiss

Throughout his Response, Judge Frye mistakenly contends that Ms. Smith has offered no factual support for her allegations that she was fired by Judge Frye in retaliation for her son's candidacy in opposing the incumbent circuit clerk in the Republican primary. *See* Response, 1 (asserting that petitioner "offered no factual support" for her contentions); *id.* at 2 (characterizing Ms. Smith's case as "mere speculation"); *id.* at 7 (arguing that Ms. Smith failed to "make any type of factual connection between her dismissal and Judge Frye's political beliefs"); *id.* at 15 (referring to a "dearth of facts" and "meager facts"). Thus, according to the respondent, the Fourth Circuit's decision simply stands for the proposition that a public employee must allege more than "bare allegations about what their employer must have believed." Response, 15.

This characterization of the Complaint is plainly wrong and misleading. It is difficult to imagine a more compelling series of allegations in a complaint. Ms. Smith's Complaint identifies precisely the types of evidence upon which courts rely in inferring a retaliatory motive and demonstrates a clear connection between her son's candidacy for public office and her termination. *See* App. D, Complaint, 47a-54a. Specifically, Ms. Smith has alleged that: (1) a close familial relationship existed between herself and the candidate for public office;[4] (2) there was a close proximity in time between

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[4]App. D, Complaint, 48a at ¶¶ 4,5 (alleging that Greg Smith, the political candidate, is Ms. Smith's adult son). Given that Judge Frye knew of the close familial relationship between the petitioner and the candidate, it is not speculative to infer that Judge Frye

her son's filing to run for public office and her own termination;[5] (3) on the day Greg Smith filed to run for office, Judge Frye stated that he wanted to fire Ms. Smith because of her son's candidacy;[6] (4) Judge Frye was angry at Ms. Smith

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believed that Ms. Smith supported her son's candidacy over that of the incumbent circuit clerk even in the absence of any action by Ms. Smith demonstrating support for her son.

[5]App. D, Complaint, 48a-49a at ¶¶ 10, 17 (alleging that on January 30, 2004, Greg Smith filed to run for the position of circuit clerk and his mother was fired shortly thereafter on February 5, 2004). Courts have generally recognized that temporal proximity is evidence of a causal connection between protected activity and an adverse employment action. *See, e.g., Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001) (noting that "cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be 'very close'"); *Culver v. Gorman & Co.*, 416 F.3d 540, 546 (7th Cir. 2005) (observing that "[s]uspicious timing is thus 'often an important evidentiary ally of the plaintiff'").

[6]App. D, Complaint, 48a-49a at ¶ 12 (alleging that on January 30, 2004, Judge Frye learned that Greg Smith had filed to run for the position of circuit clerk and told his judicial colleague, Judge Jordan, that he wanted to fire Ms. Smith because of her son's candidacy). In addition to the issue of timing, Judge Frye even announced his intention to fire Ms. Smith for this exact reason. Such statements are highly probative of an employer's motive in firing an employee. *See Campos v. City of Blue Springs*, 289 F.3d 546 (8th Cir. 2002) ("Direct evidence of discrimination may include evidence of remarks or comments which indicate discriminatory animus on the part of those with decision making authority.").

because of her son's candidacy;[7] (5) there were no complaints about Ms. Smith's work performance to support any other motive for her firing;[8] (6) Judge Frye, when asked why he fired Ms. Smith, stated that he did not have a reason for terminating her employment;[9] and (7) Judge Frye lied about the timing of his decision to terminate Ms. Smith.[10]

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[7]App. D, Complaint, 49a at ¶ 13 (alleging that, at the time Judge Frye told Judge Jordan that he intended to fire Ms. Smith, he was angry at Ms. Smith because of her son's candidacy).

[8]App. D, Complaint, 49a at ¶¶ 14, 15 (alleging that neither Judge Frye nor anyone else with whom Ms. Smith worked had ever expressed any concerns about Ms. Smith or her work performance).

[9]App. D, Complaint, 50a at ¶ 26 (alleging that when Judge Frye was asked at the grievance hearing "why he fired Ms. Smith he did not provide a reason for his decision, insisting, instead, that he did not have a reason or a motive for his decision to fire her"). Failure to proffer a credible reason for the discharge permits an inference that the reason is pretextual. *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 147 (2000) ("Once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision."). Here, Judge Frye proffered no justification for his decision at all.

[10]App. D, Complaint, 50a-51a at ¶¶ 27-28 (alleging that Judge Frye's claim that he had requested a model termination letter from the Administrative Office of the Supreme Court 3 to 4 weeks before firing Ms. Smith was discredited by the testimony of the Interim Director of the Administrative Office who stated that Judge Frye did not speak to him about firing Ms. Smith until February 4, 2004, the day before she was fired). The use of inconsistent rationalizations for an adverse employment action can lead to an inference of an illegal motive. *See, e.g., Fuentes v. Perskie*, 32 F.3d 759, 765 (3d Cir. 1994) (holding that "weaknesses, implausibilities,

Furthermore, Ms. Smith specifically alleged that Judge Frye fired her because of her son's candidacy against the incumbent circuit clerk and because he believed that she supported her son in that contest. App. D, Complaint, 49a at ¶ 18. She also pled that the hearing officer who heard her internal administrative appeal concluded that she would not have been discharged from her judicial employment on February 5, 2004, if her son had not become a candidate for circuit clerk." ¶ 29. Thus, the Complaint clearly alleges a direct causal connection between Greg Smith's candidacy for public office and his mother's termination six days later such that Ms. Smith's claim is not based on "mere speculation."

Judge Frye is also incorrect when he suggests that the Fourth Circuit would have ruled differently if Ms. Smith had been "campaigning for her son." Response, 15. The First Amendment protects political affiliations and privately held beliefs, not just the right to campaign actively on behalf of a candidate. *See* discussion 3, *supra*.

The decision below also provides a textbook example of what a court is **not** supposed to do in ruling on a Rule 12(b)(6) motion to dismiss. Rather than assuming that the plaintiff could prove what she alleged, the court below engaged in unwarranted speculation as to what innocent reasons, such as concern about a conflict of interest, Judge Frye could have had for firing Ms Smith. In doing so, the Fourth Circuit disregarded the fact that Judge Frye, when offered the opportunity to explain the reason for his decision to fire Ms. Smith, did **not** claim that he had fired her because he was concerned about a potential conflict of interest in the local

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inconsistencies, incoherencies, or contradictions" in an employer's proffered legitimate reasons for its action can create an inference that the employer did not act for the proffered reasons).

judicial system. *See* Petition, 26-28 (discussing the inappropriateness of the panel majority's speculations).

The appropriate standard for evaluating a Rule 12(b)(6) motion to dismiss was recently summarized in *Bell Atlantic Corp. v. Twombly*, __ U.S. __, 127 S. Ct. 1955 (May 21, 2007):

> While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the "grounds" of his "entitlement to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact).

Twombly, 127 S.Ct. at 1964-65 (citations omitted). As Judge Motz's separate opinion cogently demonstrated, Ms. Smith's allegations were more than sufficient to survive a Rule 12(b)(6) motion to dismiss. Ms. Smith's complaint did not contain a mere "formulaic recitation of the elements of a cause of action," but set forth, in detail, the plausible grounds for her First Amendment claim that Judge Frye's termination of her employment was politically-motivated in retaliation for her son's candidacy and his belief that she supported her son's candidacy over that of the incumbent circuit clerk. On the facts as pled, any *other* explanation would be implausible.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition for certiorari, certiorari should be granted.

Respectfully submitted,

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